

**BEFORE THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND**

Old Georgetown Village
Homeowners Association
c/o Jeffrey Van Grack, Esq.
3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814

Complainant

vs.

William H. Bevan
11229 Empire Lane
North Bethesda, MD 20852

Respondent

Case No. 584-G

DECISION AND ORDER

The above entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on March 12, 2003 pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. The duly appointed hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed by a homeowners association against one of its residents on July 9, 2002. The Association seeks the removal of a radio antenna and supporting mast approximately 18 to 20 feet high which it contends violate provisions of its Declaration of Covenants. The Association further contends that this antenna and supporting mast are not protected under the Telecommunications Act of 1996, 47 USC Sections 151 et seq., and regulations adopted pursuant

thereto. The Respondent property owner contends that the Association has no authority in this matter because he possesses a United States of America Federal Communications Commission Amateur Radio License. At the March 12, 2003 hearing, the Respondent added for the first time the defense that he at times has used the antenna to receive local television broadcast signals.

FINDINGS OF FACT

1. The Complainant Old Georgetown Village Homeowners Association is a homeowners association located in Montgomery County, Maryland.
2. Respondent is the owner of 11229 Empire Lane, North Bethesda, Maryland 20852, a property located within the boundaries of the Association. As the owner of that property Respondent is subject to the Declaration of Covenants, Conditions and Restrictions for Old Georgetown Village.
3. The Declaration of Covenants, Conditions and Restrictions for Old Georgetown Village recorded among the Land Records of Montgomery County, Maryland provides in Article VI, Section 8:

“Section 8. No exterior radio or television receiving or transmitting antennae or external apparatus shall be installed on any Lot. Normal radio and television installation only within a building are excepted.” (R-13)
4. Respondent has erected a radio antenna and supporting mast on the chimney on the roof of his property which is approximately 18 to 20 feet in height.
5. The Association has requested that Respondent remove this antenna and supporting mast. Respondent contends that because he has a United States of America Federal Communications Commission Amateur Radio License (R-29) the Association has no authority to require him to remove the radio antenna and supporting mast.

6. On March 11, 2003 Respondent sent a letter by facsimile to the Housing and Community Affairs Division of Consumer Affairs requesting that the March 12, 2003 hearing be continued. He did not contact counsel for Complainant directly, but the Commission was able to reach counsel for Complainant on the evening of March 11, 2003. Complainant objected to the continuance.

7. The basis for the request for continuance was that Respondent was scheduled to appear in the Circuit Court for Montgomery County, Maryland on March 13, 2003 and he needed to prepare to testify.

8. The panel noted that the notice for the March 12, 2003 hearing was mailed to the parties, including the Respondent on November 8, 2002. The March 13, 2003 hearing in the Circuit Court for Montgomery County, Maryland, according to Respondent's Exhibit No. 1, was set by the court on December 23, 2002. Further, if the March 12, 2003 hearing were to be continued, the next available date would not be until July or August of 2003. The Respondent had requested that the hearing in this matter be set after January 1, 2003 so as to not interfere with his night school commitments and the Commission agreed by setting the case for March 12, 2003. For those reasons, the panel unanimously denied the request for continuance. As it turned out the hearing commenced at 6:30 p.m. and ended at 8:32 p.m. The Respondent left the hearing at 8:15 p.m. during the testimony of the president of Old Georgetown Village Homeowners Association, John DePalma the Association's last witness. The Respondent stated that he could wait no longer and had to prepare for his hearing on March 13, 2003. The panel chair suggested to the Respondent that the hearing would probably not last more than another 15 minutes, and asked him to remain, but the Respondent

left anyway.

9. The testimony at the hearing was that the Respondent has represented to the Board of Directors of the Association that he works for the Federal Bureau of Investigation and that he uses the radio antenna in connection with his work. The Respondent has further said that he would be able to use this antenna for radio communication when all other devices might be down as the result of a terrorist or similar attack.

10. The Respondent testified at the hearing that at times he has used the subject antenna to receive local television broadcast signals. The contents of the record, Commission's Exhibits 1 and 2 contain no statement by the Respondent or anyone else prior to the hearing on March 12, 2003 that the antenna is used to receive local television broadcast signals. When the Respondent defended his right to have the antenna he advised the Association by letter dated February 10, 2002:

"Attached is a copy of my radio license issued by the United States of America Federal Communications Commission. Old Georgetown Village has no authority in this matter. Should you or any member of the Board of Old Georgetown Village Townhouse, employee of Old Georgetown Village Townhouse or contractors step on my property without my written permission they will be **ARRESTED** and charged with **CRIMINAL TRESPASS!!!!**" (Emphasis in original, R-28.)

The Respondent submitted with this letter a copy of a United States of America Federal Communications Commission Amateur Radio License, W3FLY, with effective dates of October 6, 1998 to October 6, 2008. (R-29)

11. Members of the panel questioned the Respondent regarding the uses of the antenna, specifically as to what devices the antenna is primarily connected. The Respondent refused to answer these questions, stating instead that Federal law did not require him to answer or allow the Commission or the Complainant Association to interfere with his installation of the antenna and

mast.

12. Witnesses from the Association testified that until the night of the hearing March 12, 2003, the Respondent had never contended that the antenna is used to receive local television broadcast signals.

13. The testimony of record was that the Respondent has a satellite dish for the purpose of receiving direct broadcast satellite service. Additionally, cable T.V. connection is available in the community, although the Respondent is not currently connected to cable.

14. None of the correspondence sent by the Association to the Respondent contained a notice of dispute required under Section 10B-9(d) of the Montgomery County Code.

CONCLUSIONS OF LAW

1. As part of these proceedings, and particularly in the course of the hearing on March 12, 2003, the panel had the opportunity to assess the credibility of the parties and witnesses by observing their demeanor, their responses to questions or in the case of the Respondent, the refusal to respond to questions, and the consistency of their testimony and positions at the hearing when compared both to the evidence in the written record and to their positions taken prior to the hearing. From the evidence of record the panel concludes that while the antenna in question may at some time have been used or be used in the future to receive local television broadcast signals, that such use was and is incidental and de minimus. The panel further concludes that such incidental, de minimus use of the antenna to receive local television broadcast signals is not protected under the Telecommunications Act of 1996 and the regulations adopted thereunder, in particular as they appear in 47 Code of Federal Regulations, Sections 1.4000 et seq. Respondent's late assertion of such use is not credible. The panel was able to observe directly and to evaluate Respondent's

testimony, compared to earlier written communications with the Association. The panel concludes that the Respondent's equivocation in his testimony, and refusal to respond to questions legitimately designed to determine the scope of use of the antenna undermined his credibility on the issue of use of the antenna.

2. The Association presented a Memorandum Opinion and Order of the Federal Communications Commission entitled Memorandum Opinion and Order adopted December 18, 2001.(R-40) The Memorandum Opinion and Order involved a request that the Federal Communications Commission expand its limited preemption policy for antenna and antenna support structures used in the amateur radio service to include a preemption of covenants, conditions and restrictions contained in deeds and bylaws of homeowners associations or regulations of an architectural control committee. The Federal Communications Commission declined to expand the scope of its limited preemption policy to include a preemption for amateur radio stations which would extend to preempt the applicability of covenants in a homeowners association such as the Complainant to the antenna in question.

3. The type of antenna and supporting mast installed by Respondent are not protected under the Telecommunications Act of 1996, 47 USC Sections 151 et seq. or the regulations adopted thereunder.

4. Since the Respondent's radio antenna and supporting mast enjoy no protection under applicable Federal Law, the covenants of the Association apply and those covenants prohibit the antenna and supporting mast.

5. The Association is authorized pursuant to Article VII, Section1 of its Declaration of Covenants, Conditions and Restrictions to exercise self-help to remove violations of its

covenants by following the procedures of that section.

6. The panel does not view the erection of the antenna and supporting mast as a matter which falls under the requirements for prior approval under Article V of the Declaration of Covenants, because there is an absolute prohibition of such antenna and the supporting masts associated with their installation.

7. Under the facts of this case, the panel is unable to find a legal basis for awarding attorney's fees to the Complainant association under Section 10B-13(d) of the Montgomery County Code. The actions of the Respondent do not fall squarely under any of the provisions of Section 10B-13(d) paragraphs 1, 2, or 3.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 20th day of May, 2003

ORDERED:

1. Respondent shall remove the subject antenna and supporting mast and all related hardware and supporting installations from his property within 30 days from the date of this order.


2. If Respondent fails to remove the subject antenna and supporting mast, etc., as described above then the Association, following the procedures of Article VII of its Covenants, may remove the same and assess the Respondent with costs as provided therein. The Association however is not required to exercise the remedy of self-help and may do so in its sole discretion.

3. In addition to any other penalty or enforcement action permitted by law Respondent's failure to comply with this order shall constitute a Class A civil violation within the meaning of Section 10B-13(j) of the Montgomery County Code.

4. The Complainant is ordered to include the notice required under Section 10B-9(d) of the Montgomery County Code in communications regarding disputes under Chapter 10B of the Montgomery County Code.

The panel suggests that the Complainant append to its Declaration of Covenants a statement that Article VI, Section 8 is modified to the extent provided by the Telecommunications Act of 1996. The provisions of Article X, Section 2. Severability will operate to leave the remaining unaffected provision of Article VI, Section 8, in full force and effect.

The decision of the panel is unanimous. Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days after the date of entry of this Order in accordance with the Maryland Rules of Procedure.


John F. McCabe, Jr., Panel Chair

MONTGOMERY COUNTY, STATE OF MARYLAND

Old Georgetown Village
Homeowners Association
c/o Jeffrey Van Grack, Esq.
3 Bethesda Metro Center, Suite 460
Bethesda, MD 20814

Complainant

vs.

William H. Bevan
11229 Empire Lane
North Bethesda, MD 20852

Respondent

COMMISSION ON COMMON
OWNERSHIP COMMUNITIES

Case No. 02-584-G

Panel Hearing Date: March 12, 2003

Decision Issued: December 22, 2004

Panel Chair Memorandum By: John F. McCabe, Jr.

MEMORANDUM DECISION AND ORDER

(On Remand from the Circuit Court for Montgomery County, MD)

The above entitled case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland pursuant to an Order of the Circuit Court for Montgomery County, Maryland entered May 28, 2004 by Judge S. Michael Pincus in Civil No. 243478. The purpose of the remand is "for more concrete and definite findings with respect to usage" of the radio antenna and supporting mast.

The duly appointed Hearing Panel considered the testimony and evidence of record on remand and finds, determines and orders as follows.

BACKGROUND

During the course of the hearing, it became apparent that the protections of Section 207 of the Telecommunications Act of 1996 and rules adopted pursuant thereto are afforded to certain antennas based upon the purposes for which they are designed. Consequently, the Panel felt obliged

to investigate not only Respondent's actual use of the antenna, but also the specific uses for which Respondent's antenna is designed.

Additionally, the Act and the regulations adopted under the Act (the Over the Air Reception Device Rule, 47 CFR Section 1.4000) allow otherwise prohibited restrictions if they are necessary to accomplish a clearly defined legitimate safety objective. 47 CFR Section 1.4000(b)(1). Consequently the Panel looked briefly at safety issues. As it turned out, safety issues do not figure into this decision, however.

FINDINGS OF FACT

1. At the hearing before this Panel on March 12, 2003, the Respondent testified for the first time that his antenna is used to receive local television broadcast signals. Prior to that time, when Respondent defended his right to have the antenna he presented a copy of a radio license issued by the United States of America Federal Communication Commission and stated, on the basis of that license, the Complainant had no authority to interfere with his use of the antenna. At the March 12, 2003 hearing Respondent testified that the antenna is used primarily for listening and viewing. He stated that at times the antenna is hooked up to a television, at times to an oscilloscope (March 12, 2003 Transcript, 51) and at times to devices that receive radio signals. He would not otherwise respond to any questions regarding the use of the antenna. Transcript, 54-56.

2. At the hearing on October 13, 2004, the Respondent testified that the antenna is at times hooked up to a television and at times to a VCR. He stated that he has a ham radio but does not hook it up to the antenna.

3. Respondent has a satellite dish, and he testified that he uses it to receive channels, for which he pays, other than local broadcast channels. Respondent testified that he uses the subject antenna to receive local broadcast channels and that he would have to pay extra to receive those same

channels through his satellite dish service. Respondent also testified that he intends to use the subject antenna to receive HD (high definition) TV when it becomes available.

4. The Complainant presented the testimony of Frank D. Davis of Davis Antenna, Inc. of Waldorf, Maryland. Mr. Davis qualified as an expert in the area of antennas as they are protected by the Over the Air Reception Devices Rule, 47 CFR Section 1.4000, and in the area of the functions and uses of antennas. Mr. Davis has qualified as an expert in these areas, according to his testimony under oath, in a number of courts throughout the country. Mr. Davis has owned a business and worked in the field of antenna installations since 1974. He was involved in the development and implementation of rules pursuant to the Telecommunications Act of 1996, Section 207. He stated that he normally testifies on behalf of dish and antenna owners who are attempting to install antennas and that this is the first time he has testified on behalf of a homeowners association which is attempting to restrict the installation of an antenna.

5. Mr. Davis inspected and photographed the subject antenna. He was able to identify the antenna and to obtain the Assembly and Installation Instructions for this specific model antenna, Complainant's Exhibit on Remand No. 5. The Respondent's antenna is one designed to receive and transmit ham radio signals. Mr. Davis testified that it is not designed to receive local broadcast television signals, although it is capable of doing so. Mr. Davis testified that in his opinion the subject antenna was not only not designed for receiving local broadcast television signals, but also it was extremely ineffective in receiving those signals. By way of example, he stated that even a coat hanger if bent into a certain shape, could receive local broadcast television signals, but that it would not be considered to be a device designed to do so.

6. Mr. Davis based his identification of the subject antenna on his visual inspection and from photographs he and others have taken of the subject antenna. The Respondent testified that he had purchased the antenna at a garage sale. The Respondent did not know what the purpose of the antenna was and he did not have any manuals or literature describing the antenna. As part of pre-hearing discovery, Respondent was asked to produce such information, and through counsel advised the Panel and the Complainant that he did not have such information. Mr. Davis testified at some length about the design and purposes of television antennas, how they receive local broadcast channels, and why the Respondent's antenna was not designed to receive local broadcast channels, even though it might be capable of doing so in some rudimentary way.

7. The Respondent has both a satellite dish and the subject antenna on his roof/chimney. Mr. Davis identified two cables running from the roof/chimney area into the Respondent's unit. One was the type of cable which would typically be connected from a satellite dish to a television. The other was the type of cable which would typically be connected from a ham radio antenna to a ham radio. Mr. Davis testified that in order to connect the ham radio type cable to a television, the connection would have to be done by stripping wires or otherwise manually altering the normal connection provided on that type of ham radio cable.

8. Based upon his inspection of the subject antenna, his review of the Assembly and Installation Instructions for Respondent's antenna (Complainant's Exhibit on Remand No. 5) his experience in developing and implementing the OTARD Rules, his service on committees with the FCC and other related entities, and his experience in the industry in installing antennas, Mr. Davis concluded that the subject antenna is not designed to receive local television broadcast signals and that it is therefore not protected by Section 207 of the Telecommunications Act of 1996 or the

OTARD Rules.

9. Each party requested an award of attorney's fees on the basis of Section 10B-13(d)(1), Montgomery County Code, which provides for an award of attorney's fees when a frivolous action is instituted or maintained. The Panel did not award attorney's fees in its original opinion. The Circuit Court also did not award attorney's fees. The Panel finds no facts which would support an award of attorney's fees since the entry of the court's order on May 28, 2004.

CONCLUSIONS OF LAW

1. The Telecommunications Act of 1996, Section 207 and the OTARD Rule adopted pursuant thereto, 47 Section 1.4000, protect certain antennas based upon their design. Pertinent to this case, the statute and rule protect antennas designed to receive local television broadcast signals and masts on which they are located.

2. The evidence of record, including the expert opinion of Frank J. Davis, establishes that Respondent's antenna is not designed to receive local television broadcast signals.

3. The fact that Respondent may use his antenna for purposes for which it is not designed does not bring him within the protection of the statute or the rule. It is the opinion of the Panel that the statute and rule are intended to protect within their scope certain devices based upon the designed functions of those devices and not upon the misuse of those devices. Respondent does not gain the protection of the law by misusing his antenna.

4. On remand the Panel again had the opportunity to observe and assess the credibility of the parties and the witnesses by observing their demeanor, their responses to questions, and the consistency of their testimony and positions at the hearing when compared to the testimony and positions presented at the March 12, 2003 hearing. The Panel concludes that the

Respondent has not been candid in describing the actual uses of his antenna. Consequently, even if this decision were required to be based only on the actual uses of the antenna, the Panel would still conclude that the Respondent is not entitled to the protections of the Telecommunications Act of 1996, Section 207 or the OTARD Rule, 47 CFR Section 1.4000. The Panel is still of the opinion that the use, if any, of the antenna to receive local television broadcast signals is incidental and de minimus.

5. Since the Respondent's antenna and supporting mast enjoy no protection under applicable Federal law, the covenants of the Association apply. Those covenants prohibit the antenna and supporting mast.

6. The Association is authorized pursuant to Article VII, Section 1 of its Declaration of Covenants, Conditions and Restrictions to exercise self-help to remove violations of its covenants by following the procedures of that section.

7. Under the facts of this case, on remand, the Panel is unable to find a legal basis for awarding attorney's fees to the Complainant or Respondent under Section 10B-13(d) of the Montgomery County Code. The actions of the parties do not fall squarely under any of the provisions of Section 10B-13(d).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 20th day of December, 2004

ORDERED:


1. Respondent shall remove the subject antenna and supporting mast and all related hardware and supporting installations from his property within 30 days from the date of this order.

2. If Respondent fails to remove the subject antenna and supporting mast, etc., as described above then the Complainant, following the procedures of Article VII of its Covenants, may remove the same and assess the Respondent with costs as provided therein. The Complainant however is not required to exercise the remedy of self-help and may do so in its sole discretion.

3. In addition to any other penalty or enforcement action permitted by law Respondent's failure to comply with this order shall constitute a Class A civil violation within the meaning of Section 10B-13(j) of the Montgomery County Code.

The foregoing was concurred by the panel members Arlene Perkins and Nadine Neel.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.


John F. McCabe, Jr., Panel Chair

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

MONTGOMERY COUNTY, MARYLAND

Plaintiff

v.

WILLIAM CHARLES BEVAN

Defendant

Citation No: 5Z33932603

RECEIVED

OCT 25 2005

ORDER FOR ABATEMENT DISTRICT COURT 05-02

Upon consideration of the verified citation filed herein and any evidence presented at trial in this case, the Court finds that Defendant has committed the violation of Montgomery County law stated in the above-referenced citation and that the Plaintiff, Montgomery County, Maryland, is entitled to this Order of Abatement pursuant to Montgomery County Code, Section 1-18(e), and it is thereupon, this 25th day of October, 2005, by the District Court of Maryland for Montgomery County

ORDERED that the Defendant shall refrain from further violations of Montgomery County Code, Section 10B-13-j; and it is further

ORDERED that the Defendant shall immediately, except as otherwise provided herein, take the following actions to correct the conditions which constitute a continuing violation of County law:

1. Comply with the final Commission on Common Ownership Communities Order no later than ten (10) days after service of a copy of this Order upon Defendant; and it is further

ORDERED that a representative of Montgomery County shall be permitted to inspect the premises to verify that the terms of this Order have been complied with; and it is further


ORDERED that if the Defendant fails to abide by this Order within 30 days of the date of this Order by failing to abate the violations and/or refrain from future violations as required by this Order, the Plaintiff, Montgomery County, has permission to enter the premises and abate

the violations as may be necessary to assure compliance with the Montgomery County Code; and it is further

ORDERED that if the Defendant fails to abate the violations and/or refrain from future violations as required by this Order and Plaintiff, Montgomery County, Maryland, abates the violations pursuant to Maryland Rule 3-648, the Plaintiff, Montgomery County, shall send the Defendant a bill for the cost of correction by regular mail to the Defendant's last known address or by any other means that is reasonably calculated to bring the bill to the Defendant's attention. If the Defendant does not pay the bill within 30 days after it is presented, the Plaintiff may file a verified statement of the costs of correcting violations with the Court; and it is further

ORDERED, that once the Court has entered the judgment against the Defendant for the cost of correcting violations, the Plaintiff may enforce a judgment in the same manner as any other civil judgment for money, or collect the judgment in the same manner as it collects real property taxes.

FAILURE TO COMPLY WITH THIS ORDER IS PUNISHABLE BY CONTEMPT.



Judge, Sixth District Court for
Montgomery County, Maryland

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